Ho Yoke Kwei & Anor v Ong Eng Hin

HIGH COURT (MELAKA) — CIVIL APPEAL NO 11-21 OF 1994
AUGUSTINE PAUL JC
24 AUGUST 1996

Civil Procedure *— Pleadings — Amendment of defence — Whether in action in subordinate court leave is required to add counterclaim by way of amendment to defence — Subordinate Courts Rules 1980 O 15 r 1(1)*

Civil Procedure *— Irregularity — Nullity and irregularity — Failure to obtain leave of subordinate court to amend — Whether such failure is only an irregularity — Whether there is distinction between nullity and irregularity — Whether such irregularity can be remedied — How discretion of court should be exercised — Subordinate Courts Rules 1980 O 2 r 1*

Civil Procedure *— Pleadings — Striking out — Application to strike out amendment irregularly made — Whether application made within reasonable time — Whether party applying had taken any fresh step after becoming aware of the irregularity — Whether party applying estopped from making application to strike out amendment*

On 10 June 1992, the respondent had filed a claim against the appellants in the magistrate's court for an order, inter alia, that they do deliver vacant possession of premises known as No 81 Jalan Munshi Abdullah, Melaka ('the premises'). The appellants filed their statement of defence on 24 August 1992. Pleadings were deemed to have closed on 8 September 1992. The respondent then made an application to the magistrate's court for leave to amend his statement of claim. The application was allowed. The amended statement of claim was then served on the appellants on 11 May 1993. On 2 September 1993 the appellants, without leave of court, filed an amended defence which had a counterclaim added to it. The respondent filed his reply to the amended defence and counterclaim on 26 October 1993 and subsequently wrote to the magistrate's court on 25 August 1994 complaining that the appellants' counterclaim had been made without leave of court. On 5 September 1994, the respondent filed an application, inter alia, to strike out the counterclaim. This application was allowed by the learned magistrate on the grounds that the counterclaim had not been added to the original statement of defence. The appellants appealed against this order. Counsel for the appellants contended if the respondent was allowed to amend his statement of claim then it was their right to amend their statement of defence and add a counterclaim, if any. He said that the Subordinate Courts Rules 1980 ('SCR 1980') was silent on the requirement of leave of court for the purpose. He also argued that as the respondent had taken a fresh step in the proceedings by filing a reply and defence to counterclaim to the amended defence and counterclaim, he was precluded from objecting to the counterclaim. He further said that it was too late for the respondent to raise any objection as the application to strike out the counterclaim was made after a delay of ten months and nine days and after the case had been set down for trial. Learned counsel also contended that the

respondent was estopped from raising any objection by reason of his conduct. Learned counsel further said that by virtue of the doctrine of acquiescence the respondent was precluded from complaining. It was also contended that as the issues raised by the claim and counterclaim arose out of the same subject matter both the claim and the counterclaim should have been allowed to have been tried together. Among the issues for consideration were: (i) whether leave of court was required under the SCR 1980 to add a counterclaim by way of an amendment; (ii) whether failure to obtain such leave amounts to a nullity or irregularity; (iii) whether the court may exercise its inherent powers to remedy irregularities; (iv) whether the respondent could be said to have waived the irregularity; and (v) whether the respondent was estopped from asserting his rights.

Held, dismissing the appeal:

(1) Amendments to pleadings under the SCR 1980, whether before or after close of pleadings, can be made only with leave of court. Therefore the addition of the appellant's counterclaim to their defence was in contravention of O 15 r 1(1) of the SCR 1980 as they had done so without leave of court (see p 303A).

(2) A failure to comply with O 15 of the SCR 1980 is only an irregularity. Pursuant to O 2 r 1(1) of the SCR 1980 there is no distinction between nullities and irregularities. However, in accordance with O 2 r 1(2) of the SCR 1980, the discretion is still with the court to decide whether it will exercise the powers entrusted to it to remedy an irregularity (see pp 306E–307E). In the circumstances the addition of the counterclaim by the appellants without leave of court is an irregularity that can be remedied. However, no application had been made by the appellants to have the irregularity rectified. Thus the counterclaim remained an irregularity (see pp 307I–308A); *Leal v Dunlop Bio-Processes International Ltd* [1984] 2 All ER 207 followed.

(3) The inherent power of the court under O 53 r 11 of the SCR 1980 is not confined to merely filling gaps in the SCR but extends to mould remedies where no provision is made for them in the SCR 1980. However, the inherent powers cannot be invoked to override express provisions in the SCR. Therefore O 2 r 1 of the SCR 1980 is not affected by the inherent powers of the court (see pp 308F–309B); *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samad & Ors* [1988] 1 MLJ 178 followed.

(4) An application to set aside for irregularity any proceedings must be made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. Based on the facts the respondent had taken steps to vacate the irregular proceedings within a reasonable time after becoming aware of it. Furthermore, neither the fact that he had filed the reply and defence to counterclaim nor the fact that the case had been set down for hearing was relevant as that had occurred before he became aware of the irregularity (see pp 309E–310D).

(5) Knowledge of facts plays a dominant role in the law of estoppel. In this case, when the respondent filed his reply and defence to counterclaim he had only one course open to him as he had no knowledge of the other (ie the respondent did not know that the counterclaim had been added without the leave of court). Thus the doctrine had no application on the facts of this case. The doctrine of acquiescence also requires knowledge which the respondent did not have. In any event, objection based on estoppel could not stand as there could be no estoppel against a statute. The respondent was not estopped from applying to set aside the counterclaim (see p 310D–G); *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 followed.

Per curiam:

A counterclaim need not form part of an original defence and can be added to the defence by way of amendment at any stage of the proceedings. In accordance with O 20 of the Rules of the High Court 1980 ('RHC 1980'), it can be done without leave of court before pleadings are closed and with leave after the close of pleadings. The power of the court to allow such an amendment is, however, subject to the injunction contained in O 20 rr 5(2) and (5) of the RHC 1980 (see p 303A–D); *Impex Transport Aktieselskabet v AG Thames Holdings Ltd* [1982] 1 All ER 894 and *CSI International Co Ltd v Archway Personnel (Middle East) Ltd* [1980] 3 All ER 215 followed; *Khan Kam Chee v Loke Wan Yat Realty Sdn Bhd* [1974] 1 MLJ 206 and *Lee Tsing Choy v Johari bin Jaalam* [1984] 1 CLJ 94 not followed.

[Bahasa Malaysia summary

Pada 10 Jun 1992, penentang telah memfailkan tuntutan terhadap perayu di mahkamah majistret untuk suatu perintah, antara lainnya, supaya mereka menyerahkan milikan kosong premis yang dikenali sebagai No 81 Jalan Munshi Abdullah, Melaka ('premis tersebut'). Perayu telah memfailkan pernyataan pembelaan pada 24 Ogos 1992. Pliding telah dianggap sebagai tertutup pada 8 September 1992. Penentang kemudian telah membuat permohonan kepada mahkamah majistret untuk kebenaran meminda pernyataan tuntutan. Permohonan itu telah dibenarkan. Pernyataan tuntutan yang dipinda itu kemudian telah diserahkan kepada perayu pada 11 Mei 1993. Pada 2 September 1993 perayu, tanpa kebenaran mahkamah, telah memfailkan pembelaan yang dipinda yang mempunyai tuntutan balas yang ditambahkan. Penentang telah memfailkan jawapannya kepada pembelaan terpinda dan tuntutan balas pada 26 Oktober 1993 dan seterusnya telah menulis kepada mahkamah majistret pada 25 Ogos 1994, mengadu bahawa tuntutan balas perayu telah dibuat tanpa kebenaran mahkamah. Pada 5 September 1994, penentang telah memfailkan permohonan, antara lainnya, untuk menolak tuntutan balas itu. Permohonan itu telah dibenarkan oleh majistret yang arif atas dasar bahawa tuntutan balas tersebut telah tidak ditambahkan kepada pernyataan pembelaan yang asal. Perayu telah merayu terhadap perintah tersebut. Peguam bagi pihak perayu telah berhujah bahawa

jika penentang dibenarkan meminda pernyataan tuntutannya, maka ia berhak untuk meminda pernyataan pembelaan dan untuk menambahkan tuntutan balas, jikalau ada. Peguam menyatakan bahawa Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') tidak mempunyai peruntukan berkaitan dengan keperluan kebenaran mahkamah untuk tujuan tersebut. Dia juga telah berhujah bahawa oleh kerana penentang telah mengambil langkah baru dalam prosiding dengan memfailkan jawapan dan pembelaan kepada tuntutan balas kepada pembelaan yang dipinda dan tuntutan balas, maka dia disekat daripada membantah terhadap tuntutan balas tersebut. Dia selanjutnya berkata bahawa adalah terlalu lambat untuk penentang membangkitkan sebarang bantahan oleh kerana permohonan untuk menolak tuntutan balas telah dibuat setelah kelambatan sepuluh bulan dan sembilan hari dan setelah kes tersebut telah ditetapkan untuk perbicaraan. Peguam juga menekankan bahawa penentang diestop daripada membangktikan sebarang bantahan oleh kerana kelakuannya. Peguam yang arif selanjutnya menyatakan bahawa berdasarkan doktrin akuiesens, penentang dilarang mengadu. Juga telah dihujahkan bahawa oleh kerana isu yang dibangkitkan oleh tuntutan dan tuntutan balas timbul daripada subjek perkara yang sama, kedua-dua tuntutan dan tuntutan balas harus dibenarkan dibicarakan bersama. Antara isu-isu untuk dipertimbangkan adalah: (i) sama ada kebenaran mahkamah diperlukan di bawah KMR untuk menambahkan tuntutan balas melalui pindaan; (ii) sama ada kegagalan untuk mendapatkan kebenaran tersebut adalah suatu pembatalan ataupun suatu luar aturan; (iii) sama ada mahkamah boleh menggunakan kuasa sedia adanya untuk membaiki luar aturan tersebut; (iv) sama ada penentang boleh dikatakan telah menepikan luar aturan itu; dan (v) sama ada penentang telah diestop daripada menuntut haknya.

Diputuskan, menolak rayuan itu:

(1) Pindaan kepada pliding di bawah KMR, sama ada sebelum atau selepas pliding ditutup, hanya boleh dibuat dengan kebenaran mahkamah. Oleh kerana itu tambahan tuntutan balas perayu kepada pembelaan perayu adalah bertentangan dengan A 15 k 1(1) KMR kerana ianya telah dibuat tanpa kebenaran mahkamah (lihat ms 303A);

(2) Kegagalan menurut A 15 KMR adalah hanya suatu luar aturan. Berdasarkan A 2 k 1(1) KMR, tidak ada perbezaan di antara pembatalan dan luar aturan. Namun demikian, mengikut A 2 k 1(2) KMR, budi bicara kekal dengan mahkamah sama ada ia akan menggunakan kuasa yang diberikannya untuk memperbaiki luar aturan tersebut (lihat ms 306E–307E). Dalam keadaan kes ini, tambahan tuntuan balas itu oleh perayu tanpa kebenaran mahkamah adalah suatu luar aturan yang dapat diperbaiki. Walau bagaimanapun, tidak ada permohonan yang dibuat oleh perayu supaya luar aturan itu diperbaiki. Dengan demikian tuntutan balas itu tetap menjadi satu luar atauran (lihat ms 307I–308A);

Leal v Dunlop Bio-Processes International Ltd [1984] 2 All ER 207 diikut. A

(3) Kuasa sedia ada mahkamah di bawah A 53 k 11 KMR adalah tidak dihadkan kepada mengisi kekosongan dalam KMR tetapi juga dilanjutkan kepada membentukkan remedi di mana tidak ada peruntukan dalam KMR. Walau bagaimanapun kuasa sedia ada mahkamah tidak boleh digunakan untuk mengatasi peruntukan nyata dalam KMR. Oleh itu kuasa sedia ada mahkamah tidak membawa kesan ke atas A 2 k 1 KMR (lihat ms 308F–309B); *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samad & Ors* [1988] 1 MLJ 178 diikut. B C

(4) Satu permohonan untuk mengetepikan kerana luar aturan mana-mana prosiding harus dibuat dalam tempoh masa yang munasabah dan sebelum pihak yang memohon telah mengambil langkah yang baru setelah sedar akan luar aturan tersebut. Berdasarkan fakta-fakta, penentang telah mengambil langkah untuk membatalkan prosiding luar aturan tersebut dalam tempoh masa yang munasabah setelah ia sedar akan luar aturan tersebut. Lagipun, fakta bahawa dia telah memfailkan jawapan dan pembelaan kepada tuntutan balas ataupun fakta bahawa kes telah ditetapkan untuk perbicaraan tidak relevan oleh kerana ianya telah berlaku sebelum dia sedar akan luar aturan tersebut (lihat ms 309E–310D). D E

(5) Pengetahuan fakta-fakta memainkan peranan yang penting dalam undang-undang estopel. Dalam kes ini, ketika penentang memfailkan jawapan dan pembelaan kepada tuntutan balas, dia hanya mempunyai satu jalan terbuka untuknya oleh keranan dia tidak mempunyai pengetahuan mengenai pilihan yang satu lagi (iaitu penentang tidak tahu bahawa tuntutan balas telah ditambah tanpa kebenaran mahkamah). Maka doktrin tersebut tidak terpakai atas fakta-fakta kes tersebut. Doktrin akuiesens memerlukan pengetahuan yang tidak dipunyai oleh penentang. Apa sekalipun, bantahan berdasarkan estopel tidak dapat didirikan oleh kerana tidak ada estopel terhadap sebarang statut. Penentang adalah tidak diestopkan daripada memohon untuk mengetepikan tuntutan balas itu (lihat ms 310D–G); *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 diikut. F G H

Per curiam:

Satu tuntutan balas tidak perlu menjadi sabahagian daripada pembelaan asal dan boleh ditambahkan kepada pembelaan itu melalui pindaan pada mana-mana tahap prosiding. Mengikut A 20 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), ia boleh dilakukan tanpa kebenaran mahkamah sebelum pliding ditutup dan dengan kebenaran mahkamah selepas pliding ditutup. Kuasa mahkamah untuk membenarkan pindaan sebegitu, namun demikian, adalah tertakluk kepada syarat-syarat yang terkandung di dalam A 20 k 5(2) dan (5) KMT (lihat ms 303A–D); *Impex Transport Aktieselskabet v AG Thames Holdings Ltd* [1982] 1 All ER 894 dan *CSI International Co* I

Ltd v Archway Personnel (Middle East) Ltd [1980] 3 All ER 215 diikut; *Khan Kam Chee v Loke Wan Yat Realty Sdn Bhd* [1974] 1 MLJ 206 dan *Lee Tsing Choy v Johari bin Jaalam* [1984] 1 CLJ 94 tidak diikut.]

Notes

For a case on the distinction between an irregularity and a nullity, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1811.

For cases on the amendments to the statement of defence, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2527–2532.

Cases referred to

ABZ (An Infant), Re [1992] 2 SLR 442 (refd)

Alloy Automative Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283 (refd)

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman [1987] 2 MLJ 633 (refd)

Bank Bumiputra Malaysia Bhd v Sal Enterprise Sdn Bhd & Ors [1994] 3 CLJ 289 (refd)

Bernstein & Anor v Jackson & Ors [1982] 2 All ER 806 (refd)

Chew Geok Lin v Pau Ping Kwang [1965] 1 MLJ 25 (refd)

CSI International Co Ltd v Archway Personnel (Middle East) Ltd [1980] 3 All ER 215 (folld)

Foo Loong Lithographer Pte Ltd v Mun Hean Realty Pte Ltd [1989] 2 MLJ 80 (refd)

Fry v Moore (1889) 23 QBD 395 (refd)

Harkness v Bell's Asbestos and Engineering Ltd [1966] 3 All ER 843 (refd)

'Hoe Lee', The, Owners of Cargo Ex 'Kuala Kangsar' v Owners of 'Hoe Lee' [1970] 1 MLJ 45 (refd)

Impex Transport Aktieselskabet v AG Thames Holdings Ltd [1982] 1 All ER 894 (folld)

Khan Kam Chee v Loke Wan Yat Realty Sdn Bhd [1974] 1 MLJ 206 (folld)

Knighthood Assurance Consultants Ltd v Meacher (1976) 120 SJ 117 (refd)

Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd [1991] 2 MLJ 129 (refd)

Leal v Dunlop Bio-Processes International Ltd [1984] 2 All ER 207 (folld)

Lee Tsing Choy v Johari bin Jaalam [1984] 1 CLJ 94 (refd)

Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1990] 1 MLJ 445 (refd)

Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7 (folld)

Metroinvest Anstalt & Ors v Commercial Union Assurance Co plc [1985] 2 All ER 318 (refd)

Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd 4 WW 542 (refd)

Ng Yee Fong & Anor v EW Talalla [1986] 1 MLJ 25 (refd)

Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v QBE Insurance (International) Ltd [1989] 1 MLJ 1 (refd)
Overseas Chinese Banking Corp Ltd v Eastern Auto Co Ltd [1961] MLJ 300 (refd)
Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)
Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178 (refd)
Pontin & Anor v Wood [1962] 1 QB 594 (refd)
Pritchard (decd), Re, Pritchard v Deacon & Ors [1963] 1 Ch 502 (folld)
Shanghai Hall Ltd v Town House Hotel Ltd [1967] 1 MLJ 223 (refd)
Supputetchimi a/p Karpaya v Palmco Bina Sdn Bhd [1994] 2 CLJ 1191 (refd)

Legislation referred to

Interpretation Act 1967 s 3
Rules of the High Court 1980 O 15, O 20 rr 3, 5
Subordinate Courts Rules 1980 O 2 rr 1, 2, O 4, O 8 rr 1, 2, O 15 r 1, O 53 r 11

LK Tiu (*Koh Kim Leng & Co*) for the plaintiff/respondent.
Amar Chand Vohrah (*Vohrah & Tan Chee Lan*) for the defendants/appellants.

Augustine Paul JC: On 10 June 1992, Ong Eng Hin (the respondent in the appeal before me) had filed a claim against Ho Yoke Kwei and Chee Mian Poon (the appellants) in the magistrate's court at Melaka for an order, inter alia, that they do deliver vacant possession of premises known as No 81 Jalan Munshi Abdullah, Melaka. The appellants filed their statement of defence on 24 August 1992. The pleadings were deemed to have closed on 8 September 1992. The respondent then made an application to the magistrate's court for leave to amend his statement of claim to alter the number of the premises appearing therein from '81' to '81A & B'. The application was allowed. The amended statement of claim was then served on the appellants on 11 May 1993. On 2 September 1993 the appellants, without leave of court, filed an amended defence which had a counterclaim added to it. The respondent then filed his reply to the amended defence and counterclaim on 26 October 1993 and subsequently wrote to the magistrate's court on 25 August 1994 complaining that the appellants' counterclaim had been made without leave of court. On 5 September 1994 the respondent filed an application, inter alia, to strike out the counterclaim. This application was allowed by the learned magistrate. The appeal before me is by the appellants against this order. For ease of reference the Subordinate Court Rules 1980 and the Rules of the High Court 1980 will hereafter be referred to as the SCR 1980 and the RHC 1980 respectively.

In her grounds of judgment the learned magistrate said that she allowed the respondent's application because the counterclaim had not been added to the original statement of defence. She referred to *The Subordinate Courts Practice* by KS Dass and Abdul Hamid where the learned authors had this to say at p 132:

> ... A defendant who has any claim against the plaintiff may, instead of bringing a separate action, make a counterclaim in respect of his claim and this he can do so by adding the counterclaim to his defence (see SCR 1980 O 8 r 2(1)).

She said that there is no provision in the SCR 1980 authorizing a counterclaim to be added to an amended defence. In support she referred to *Lee Tsing Choy v Johari bin Jaalam* [1984] 1 CLJ 94 where the High Court allowed an application to amend the defence but disallowed the application to add a counterclaim. Finally she said that allowing the counterclaim to stand will prejudice the case for the respondent.

Before me learned counsel for the appellants contended that if the respondent is allowed to amend his statement of claim then it is their right to amend their statement of defence and add a counterclaim, if any. He said that the SCR 1980 is silent on the requirement of leave of court for that purpose. He then argued that as the respondent had taken a fresh step in the proceedings by filing a reply and defence to counterclaim to the amended defence and counterclaim, he was precluded from objecting to the counterclaim. He further said that it was too late for the respondent to raise any objection as the application to strike out the counterclaim was made after a delay of ten months and nine days and after the case had been set down for trial. In support he cited *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1987] 2 MLJ 633 where Zakaria Yatim J (as he then was) in construing O 18 r 19 of the RHC 1980 said at p 635:

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule, before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial (see 1 *Supreme Court Practice* 1985, at p 304).

Learned counsel also contended that the respondent was estopped from raising any objection by reason of his conduct. He referred to *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 where Lord Templeman said at pp 11–12:

> In Spencer, Bower and Turner's *The Law Relating to Estoppel by Representation* (3rd Ed, 1977), para 310 summarizes the doctrine of election as applied to the law of estoppel in these terms:
>
> > 'Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be "confronted" with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice.'
>
> In the present case the purchaser could not take the damages and obtain specific performance. By demanding and accepting the deposit of the damages the purchaser chose to adopt the order of the trial judge and relinquished

the right to appeal for that order to be set aside and for specific performance to be substituted. A

Paragraph 322 of the cited work by Spencer, Bower and Turner relating to election in the conduct of litigation, is in these terms:

> 'Where a litigant has taken the benefit, in whole or in part, of a decision in his favour, he is precluded from setting up in any subsequent proceedings between the same parties, by way of appeal or otherwise, that such decision was erroneous, or, though correct as to the part which was in his favour, was wrongly decided as to the residue.' B

Learned counsel further said that by virtue of the doctrine of acquiescence, the respondent was precluded from complaining. He referred to *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25 where Mohamed Azmi SCJ said at p 27: C

> ... The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his right of which he did not know at the time, and in that sense acquiescence is an element of laches. The term is however properly used where a person having a right, D and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed; a person so standing by cannot afterwards be heard to complain of the act (see *De Bussche v Alt* (1878) 8 Ch D 286 at p 314). ... E
>
> ...
>
> Paragraph 1474 of 16 *Halsbury's Laws of England* (4th Ed), on the subject of 'Elements in the Estoppel' states:
>
> > 'When A stands by while his right is being infringed by B the following circumstances must as a general rule be present in order that the estoppel may be raised against A: F
> >
> > (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted;
> >
> > (2) B must expend money, or do some act, on the faith of his mistaken belief, otherwise, he does not suffer by A's subsequent assertion of his rights; G
> >
> > (3) Acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A must know of his own rights;
> >
> > (4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B to proceed on his mistake; H
> >
> > (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal rights.'

He also contended that the learned magistrate erred in relying on *Lee Tsing Choy v Johari bin Jaalam* [1984] 1 CLJ 94. On the finding by the learned magistrate that the counterclaim will prejudice the case for the respondent he referred to *Shanghai Hall Ltd v Town House Hotel Ltd* [1967] 1 MLJ 223 where the Federal Court held that as the issues raised by the claim and counterclaim arose out of the same subject matter both the claim and the counterclaim should have been allowed to have been tried together. I

Learned counsel for the respondent in his reply said that pursuant to the provisions of O 8 r 2(1) of the SCR 1980, the counterclaim must have been added to the original defence. The said rule reads as follows:

> 2(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter, and where he does so, he must add the counterclaim to his defence.

He then referred to *Kham Kam Chee v Loke Wan Yat Realty Sdn Bhd* [1974] 1 MLJ 206 and *Lee Tsing Choy v Johari bin Jaalam* [1984] 1 CLJ 94 in support. In contending that the appellants' right to amend without leave is limited following the amendment made by him with leave, he referred to *The Supreme Court Practice 1985*, where it is stated at p 337 as follows:

> Where the plaintiff is given leave to amend his statement of claim, the defendant is not entitled, in the absence of express leave to do so, to introduce any amendment that he chooses, but his implied right to amend his defence is limited to making only such amendments as are consequential upon the amendments made to the statement of claim, ie it extends to amending only those parts of the defence which relate to the amended allegations made in the statement of claim and does not extend to the parts which relate to allegations in the statement of claim not affected by the amendments made therein: *Squire v Squire* [1972] Ch 391; [1971] 1 All ER 89.

He then quoted *Bank Bumiputra Malaysia Bhd v Sal Enterprise Sdn Bhd & Ors* [1994] 3 CLJ 289 where it was held that the defendant's right to introduce the counterclaim is within the time provided for service of the defence and as the appellants in the present case have failed to exercise that right in time that right is gone. With regard to the appellants' reliance on estoppel, learned counsel said that estoppel does not operate against a statute. He concluded by submitting that as the counterclaim had been introduced without leave of court, it is a nullity and relied on *The 'Hoe Lee'; Owners of Cargo Ex 'Kuala Kangsar' v Owners of 'Hoe Lee'* [1970] 1 MLJ 45 which had followed *Re Pritchard (decd), Pritchard v Deacon & Ors* [1963] 1 Ch 502.

In the light of the submissions of both parties the following matters required deliberation:

(i) whether the appellants were entitled to add the counterclaim to the defence after the defence had been filed;

(ii) whether the appellants made the counterclaim in a proper manner;

(iii) whether the conduct of the respondent had affected his rights; and

(iv) whether the counterclaim would prejudice the case for the respondent.

It will be recalled that the appellants added the counterclaim to their amended defence after the respondent had amended his statement of claim with leave of court. On 11 May 1995 the amended statement of claim was served on the appellants who filed their amended defence and counterclaim on 2 September 1993 — after a lapse of almost four months.

As pointed out by learned counsel for the respondent O 8 r 2(1) of the SCR 1980 provides that where a defendant in any action alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter, he may, instead of bringing a separate action, make a counterclaim in respect of that matter, and where he does so he must add the counterclaim to his defence. Does this rule mean that a counterclaim, if any, must come with the defence when it is originally filed? Alternatively, can a defendant, having filed a defence, subsequently amend his defence by adding a counterclaim? This matter has been alluded to in some local cases.

In *Khan Kam Chee v Loke Wan Yat Realty Sdn Bhd* [1974] 1 MLJ 206 Mohamed Azmi J (as he then was) had this to say at p 208:

> ... To digress a little, in the case of *Tham Hoeng Meow v Allied Timber Co Ltd* CS No 189/71 (unreported) which was referred to by Mr Thayalan, I had the occasion to express my doubt as to the desirability of allowing a counterclaim to be included for the first time after the close of pleadings, as I was of the view that a distinction should be made between amendment of a counterclaim which had already been set up in the original defence and an application to include a counterclaim for the first time.

This passage found favour with Zakaria Yatim J (as he then was) in *Lee Tsing Choy v Johari bin Jaalam* [1984] 1 CLJ 94 where his Lordship said at p 96:

> In the proposed amended defence, the defendant also included a counterclaim, where he was claiming for the plaintiff a sum of RM7,000 less retention overpaid to the plaintiff which was not done. The counterclaim was introduced for the first time after the close of the pleadings. I entirely agree with the view expressed by Mohamed Azmi J (as he then was) in *Khan Kam Chee*'s case, supra, where he said:
>
> > 'I had occasion to express my doubt as to the desirability of allowing a counterclaim to be included for the first time after the close of pleadings, as I was of the view that a distinction should be made between amendment of a counterclaim which had already been set up in the original defence and an application to include a counterclaim for the first time.'
>
> In that case he dismissed the application to include a counterclaim against the plaintiff for the first time. In the circumstances, I allow the defendant leave to amend his statement of defence as proposed, but dismiss his application to include the counterclaim.

As the above two cases were proceedings commenced in the High Court the applicable rules are the RHC 1980. Quite obviously, the applications to add a counterclaim in the two cases that I have referred to were not allowed on the basis that an amendment to include a counterclaim cannot be allowed if it was not already part of the original defence. With the utmost respect, I am unable to see any such restriction in O 15 r 2(1) of the RHC 1980 which deals with counterclaims and O 20 of the RHC 1980 which deals with amendments. Order 20 r 3 of the RHC 1980 provides for amendments that can be made to pleadings without leave of court and r 5(1) of the same order is a general provision that allows amendments to be made with leave of court. It must be noted that the word 'amendment' as defined in *Black's Law Dictionary* (6th Ed) means:

A To change or modify for the better. To alter by modification, deletion or addition.

Thus an amendment to a pleading can include the addition of something that was originally not in it. This, to my mind, means that a counterclaim can be added to a defence by way of amendment. In accordance with O 20 B of the RHC 1980 it can be done without leave of court before pleadings are closed and after the close of pleadings with leave. Furthermore O 15 r 2(1) of the RHC 1980 which provides that a defendant '... may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence' merely says that the counterclaim must be added to the defence. C It does not say that it must form part of the original defence. The object of adding it to the defence is only to minimize the pleadings. Thus it can be added to the defence at any stage of the proceedings. I find support for this proposition in some English decisions. In *Impex Transport Aktieselskabet v AG Thames Holdings Ltd* [1982] 1 All ER 894 Robert Goff J said at p D 905:

> An action is, of course, commenced by the formal step of the issue of a writ; one would expect to find a similar formal step for the initiation of a counterclaim, and the only comparable step appears to be the service of a counterclaim, *either together with or subsequently added to the defence*, or the service of some other document which, by virtue of some order of the court, E is to stand as a counterclaim, as for example when the court makes an order dispensing with pleadings. (Emphasis added.)

In *CSI International Co Ltd v Archway Personnel (Middle East) Ltd* [1980] 3 All ER 215 Roskill LJ said that a counterclaim may be made up to the time where there is a judgment which has not been stayed. His F Lordship added at p 220 that:

> ... when the plaintiff has received full satisfaction of the judgment which he has obtained against the defendant, I do not think there is still extant any action by the plaintiff in which the defendant could properly counterclaim against him.

G Be that as it may, the power of the court to allow such an amendment is subject to the injunction contained in O 20 rr 5(2) and (5) of the RHC 1980 which read as follow:

> (2) Where an application to the court for leave to make the amendment mentioned in paras (3), (4) or (5) is made after any relevant period of H limitation current at the date of issue of the writ had expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> ...
>
> (5) An amendment may be allowed under para (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of I action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

The general power to amend under O 20 r 5(1) is subject to sub-r (2) which says that where an application for leave to make an amendment is

made *after* any relevant period of limitation current at the date of issue had expired then it shall be allowed in the circumstances mentioned in sub-rr (3), (4) and (5). In my opinion the restriction placed by sub-r (2) does not apply where the application for leave to amend is made *before* the expiry of the limitation period. Thus in such circumstances an application to add a counterclaim can be made under O 20 of the RHC 1980. In the case of the subordinate courts the equivalent provision is O 15 of the SCR. Accordingly, an application to add a counterclaim can be made at any time provided the limitation period has not expired.

The corollary is whether leave of court is required under the SCR to add a counterclaim by way of an amendment. The RHC 1980 makes distinct references to amendments with leave and without leave. In the case of the subordinate courts the relevant provision is O 15 r 1(1) of the SCR which reads as follows:

> Subject to O 8 rr 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his summons, or any party to amend his pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

In my opinion the words '... the court may ... allow ...' presupposes the fact that the court must be moved before it can be in a position to allow an application to amend. The result is that amendments to pleadings under the SCR 1980, whether before or after close of pleadings, can be made only with leave of court. However, the SCR 1980 contains no provisions dealing with consequential amendments by the other party following an amendment to a pleading unlike O 20 r 3 of the RHC 1980 which allows such amendments. Notwithstanding the absence of any such provision in the SCR 1980, the High Court procedure may be adopted by the subordinate courts in accordance with O 4 r 4(1) of the SCR 1980 which provides that in any matter of procedure or practice not provided for, the procedure and practice for the time being in force or in use in the High Court shall, as near as may be, be followed and adopted. The addition of a counterclaim is clearly not a consequential amendment following the amendment to the statement of claim by the respondent. In the upshot, the addition of the appellants' counterclaim to their defence is in contravention of O 15 r 1(1) of the SCR 1980 as they had done so without leave of court. That leads to a consideration of the effect of an amendment made without leave of court as done by the appellants in the appeal before me. Learned counsel for the respondent contended that it is a nullity.

The answer to this issue can be found in O 2 r 1(1) and (2) of the SCR 1980 which read as follows:

> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein.
>
> (2) Subject to para (3), the court may, on the ground that there has been such a failure as is mentioned in para (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the

> proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

Order 2 r 1 says in unambiguous terms that a failure to comply with the rules shall be treated as an irregularity and shall not nullify the proceedings. The distinction between a nullity which is not curable and an irregularity which can be cured under O 70 r 1 of the then English Rules of the Supreme Court was exhaustively dealt with in *Re Pritchard (decd), Pritchard v Deacon & Ors* [1963] 1 Ch 502 where Upjohn LJ said at pp 523–524:

> I do not think that the earlier cases or the later dicta upon them prevent me from saying that, in my judgment, the law when properly understood is that O 70 applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of O 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the party entitled to complain of the defect ex debito justitiae. Lord Denning in *MacFoy* ([1962] AC 152, 160) pointed out that a useful test was whether the defect could be waived. I agree with that as a good common-sense text, but I also agree with Mr Rubin that it cannot be a completely legal text, for until you have decided whether the proceeding is a nullity, you cannot decide whether it is capable of waiver.
>
> The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. ...; (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued but fail to comply with a statutory requirement.

However, it must be noted that O 70 r 1 of the English rules has now been replaced with the new O 2 rr 1 and 2 which are in pari materia with O 2 rr (1) and (2) of the SCR 1980. In interpreting the new English O 2 r 1, Lord Denning MR emphatically stated in *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843, after having referred to *Re Pritchard (decd)*, that the position has now changed. This is what his Lordship said at pp 845–846:

> ... This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that 'it is not possible ... for an honest litigant in the Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.' That could not be said in 1963; see *Re Pritchard (decd)* [1963] 1 All ER 873, [1963] Ch 502); but it can be in 1966. The new rule does it.

The dicta of Lord Denning MR found favour with the Singapore Court of Appeal where Thean J in delivering the judgment of the Court in *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129 said at p 134:

This rule is identical with O 2 r 1 of the Rules of Supreme Court in England, and in *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 at pp 735–736, Lord Denning MR had this to say with regard to this rule:

> 'This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.'

That may be the true effect of O 2 r 1.

On the new English rule, 37 *Halsbury's Laws of England* (4th Ed) says at para 36:

> This is one of the most beneficent rules of the Rules of Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-compliance must be treated as an irregularity and must not be treated as a nullity. Under the former rule, which it replaced, a distinction was drawn between a non-compliance which rendered the proceedings a nullity, in which case the court had no discretion and no jurisdiction to do otherwise than set the proceedings aside, and a non-compliance which merely rendered the proceedings irregular in which case the court had a discretion to amend the defective proceedings as it thought fit. The modern rule has done away with this old distinction, and every omission or mistake in practice or procedure is to be regarded an an irregularity which the court can and should rectify as long as it can do so without injustice.

It is therefore clear that pursuant to O 2 r 1(1) of the SCR 1980, the old distinction between nullities and irregularities has ceased to exist. However, in accordance with O 2 r 1(2) of the SCR 1980, the discretion is still with the court to decide whether it will exercise the powers entrusted to it to remedy an irregularity. Judicial activism has placed some guidelines on the exercise of that discretion. Lord Denning MR himself said in the *Harkness* decision that an omission or mistake should be rectified — '... so long as it can do so without injustice.' Cumming-Bruce LJ in considering the way in which the court should exercise its discretion to rectify an irregularity said in *Metroinvest Anstalt & Ors v Commercial Union Assurance Co plc* [1985] 2 All ER 318 at p 324:

> I would say that in most cases the way in which the court exercises its powers under O 2 r 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say the particular failure to comply with the rules. But I would construe O 2 r 1(2) as being so framed as to give the court the widest possible power in order to do justice.

On the same issue Wee Chong Jin CJ said in *The Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v QBE Insurance (International) Ltd* [1989] 1 MLJ 1 at p 3:

> It follows that if the non-renewal of the writ is an irregularity that can be cured under O 2 r 1, the next question is as to the exercise of the court's discretion whether or not to cure such irregularity. In this respect, the principle is clear that the court's power to cure an irregularity under O 2 r 1, in the first place, can only be exercised if the court could have properly granted the order for

A which there was a failure to apply, had there also been an application made pursuant to the relevant provision in the rules. In other words, the power in O 2 r 1 to cure irregularities is subject to the same principles which govern an ordinary application made under the relevant rule.

In *Bernstein & Anor v Jackson & Ors* [1982] 2 All ER 806 it was held that B where the irregularity sought to be cured amounted to a fundamental defect in the proceedings then the court should not exercise its discretion under O 2 r 1 to rectify it. In adopting this case Thean J said in the *Kuah Kok Lim* decision at p 134:

> C Notwithstanding the very wide powers given to the court to remedy non-compliance with the Rules of Supreme Court 1970, there may be failure or non-compliance with the rules which is so fundamental or serious that the court ought not to exercise its discretion under r 1 to remedy it.

In *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283, James Foong J set aside an order made on the ground that the failure to comply with the statutory requirements in that D case was fundamental and serious. In *Leal v Dunlop Bio-Processes International Ltd* [1984] 2 All ER 207, the plaintiff obtained the issue of a writ, to be served out of jurisdiction, without leave of the court as required by O 6 r 7 of the Rules of Supreme Court. He then served the writ out of jurisdiction without first obtaining leave of the court as required by O 6 r 7. The E defendants applied under O 12 r 8 to set aside the service by reason of these irregularities. By this time the writ's validity had expired and the limitation period had passed. The plaintiff therefore cross-appealed for the renewal of the writ and for leave to serve out of jurisdiction. The Court of Appeal had no hesitation in holding that irregularities of these kind are curable. Stephenson LJ said at p 212:

F

> ... Order 2 r 1 gives the court the power to make good the service of the writ and the judge could have given leave retroactively.

May and Slade LJJ said in that case that only in an exceptional case should the court, in the exercise of its power retroactively to make good irregular G service of a writ out of jurisdiction, validate after the event the purported service out of jurisdiction without leave of process issued by an English court. The court, however, retracted its support from the view expressed in the *Bernstein* decision that O 60 r 8 provided an exclusive path for the renewal of writs and that irregularities in issue could not be cured under O 2 r 1. Slade LJ, who was a party to both decisions, agreed. In commenting H on the *Leal* decision, it is stated at p 220:

> It may therefore be taken to be settled that the court has jurisdiction under O 2 r 1 to cure irregular service of a writ, even by giving retroactive leave for its service out of the jurisdiction.

It has also been held that failure to obtain leave before setting down an I appeal is only an irregularity and does not render the notice of appeal a nullity (see *Knighthood Assurance Consultants Ltd v Meacher* (1976) 120 SJ 117).

In adopting the views expressed in the *Leal* decision I am of the opinion that where an amendment to a pleading has been made without leave of court as required by O 8 r 1(1) of the SCR 1980, it amounts to an

irregularity which can be cured retroactively under O 2 r 1. In the circumstances the addition of the counterclaim by the appellants in the appeal before me without leave of court is an irregularity that can be remedied. However, no application was made by the appellants to have the irregularity rectified. In the event the counterclaim still remains an irregularity.

I interpolate to refer to O 53 r 11 of the SCR 1980 which reads as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent power of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

This rule deals with the inherent power of the court. Learned counsel for the respondent submitted before the learned magistrate that this rule overrides O 2 r 1 and that therefore the addition of the counterclaim should be regarded as a nullity in the interests of justice. He probably had in mind *Suppuletchimi a/p Karpaya v Palmco Bina Sdn Bhd* [1994] 2 CLJ 1911. It is said that the overriding feature of the inherent jurisdiction of the court is that it is a part of procedural, and not substantive law; that it is exercisable by summary process, without plenary trial; that it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not (see 37 *Halsbury's Laws of England* (4th Ed) para 14). In *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143, Edgar Joseph Jr J (as he then was) said at p 147 that '... it is clear that the inherent jurisdiction of the court includes all the powers that are necessary to fulfil itself as a court of law; to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.' The question that arises for consideration is whether the inherent jurisdiction of the court is capable of overriding any specific provision of the SCR 1980, and in particular O 2 r 1 as contended by learned counsel.

The starting point for the answer to this question is *Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd* 4 WW 542 where the Court of Appeal of Manitoba in adopting a passage from Sir Jack Jacob's article entitled *The Inherent Jurisdiction of the Court* said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being a reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. In *Loo Chay Meng v Ong Cheong Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445, VC George J (as he then was) held that in a situation where a lacuna exists in the RHC 1980 and where the same causes a procedural injustice in that it does not provide an adequate remedy or remedies, the court is then not only entitled to fill the gap by using its inherent jurisdiction, but is obliged to do so, in order to avoid an injustice. In *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143, Edgar Joseph Jr J (as he then was) said that the court has jurisdiction to grant a Mareva injunction in the exercise of its inherent

jurisdiction. This shows that the inherent power of the court is not confined to merely filling in gaps in the rules but extends to mould remedies where no provision is made for them in the rules. However, the inherent powers cannot be invoked to override express provisions in the rules. The limitation on the use of the court's inherent jurisdiction was laid down by the Supreme Court in *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samad & Ors* [1988] 1 MLJ 178 where Syed Agil Barakbah SCJ in referring to O 92 r 4 of the RHC 1980, which is in pari materia with O 53 r 11 of the SCR 1980, said at p 181:

> It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

This is illustrated by *Re ABZ (An Infant)* [1992] 2 SLR 442 where an application to set aside an adoption order in the exercise of the court's inherent jurisdiction was refused as the Adoption of Children Act 1930 provided a remedy for re-adopting the child. In the circumstances O 2 r 1 of the SCR 1980 is not affected by the inherent powers of the court.

As I have found that the addition of the counterclaim by the appellants is an irregularity and still remains so, the remaining matter for deliberation is whether the conduct of the respondent can be said to have waived the irregularity. In particular I shall first refer to the steps taken by the respondent after the addition of the counterclaim. Learned counsel for the appellants contended that the fact that the respondent had filed a reply and defence to counterclaim and that the case had already been fixed for hearing on 5 October 1995 had just that effect. He relied on O 2 r 2(1) of the SCR 1980 which reads as follows:

> An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

As provided by the rule, the application must be made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. In *Pontin & Anor v Wood* [1962] 1 QB 594 an application to set aside a writ for not disclosing a cause of action more than four months after service of writ was held to be not within a reasonable time. In *Fry v Moore* (1889) 23 QBD 395 the step taken by the defendant to defend the case on the merits despite knowledge of the irregularity was held to be a waiver.

In his affidavit affirmed on 5 September 1994, learned counsel for the respondent has explained the reason for his delay in filing the application to set aside the counterclaim. This is what he said in para 6:

> Saya baru sahaja mendapat tahu bahawa tidak ada sebarang Perintah yang dikeluarkan oleh Yang Arif Tuan Majistret untuk meminda dan memfailkan pindaan pernyataan pembelaan dan tuntutan balas. Sesalinan minit bertarikh 23 Ogos 1993 yang telah firma saya terima pada 25 Ogos 1994 adalah dilampirkan di sini dan ditandakan sebagai eks 'ACV'.

Promptly, learned counsel wrote to the court by letter dated 25 August 1994 saying that the counterclaim had been made without leave of court. He then applied to the court on 5 September 1994 to set aside the counterclaim. None of the assertions made by him in his affidavit were denied or disputed by the appellants. In *Alloy Automative Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 it was held that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted. In the appeal before me no affidavit in reply had been filed. Thus, I am compelled to accept the contents of the respondent's affidavit to be the truth as I have no good reason for not doing so. In *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 284 the defendant's private liquidator who was recently appointed only became aware of the irregularity after his appointment. It was held that the application to set aside, although brought some six years later, was within a reasonable time. In my opinion, therefore, the 'reasonable time' in O 2 r 2(1) of the SCR 1980 means a reasonable time after becoming aware of the irregularity. Thus, it is my view that the respondent had taken steps to vacate the irregular proceedings within a reasonable time after becoming aware of it. Furthermore, neither the fact that he filed the reply and defence to counterclaim nor the fact that the case had been set down for hearing is relevant as that had occurred before he became aware of the irregularity.

Finally, I shall consider whether the conduct of the respondent estops him from asserting his rights. Knowledge of facts plays a dominant role in the law of estoppel. In *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7, Lord Templeman said that it is the essence of the doctrine of election that the party electing shall be confronted with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice. When the respondent filed his reply and defence to counterclaim he had only one course open to him as he had no knowledge of the other. Thus the doctrine has no application on the facts of this case. With regard to the doctrine of acquiescence, the case cited by learned counsel for the appellants also requires knowledge which, as I have said, the respondent did not have. In any event the objection of learned counsel based on estoppel cannot stand as there can be no estoppel against a statute (see *Foo Loong Lithographer Pte Ltd v Mun Hean Realty Pte Ltd* [1989] 2 MLJ 80; *Overseas Chinese Banking Corp Ltd v Eastern Auto Co Ltd* [1961] MLJ 300 and *Chew Geok Lin v Pau Ping Kwang* [1965] MLJ 25). For this purpose the SCR 1980 is clearly a subsidiary legislation within the meaning of s 3 of the Interpretation Act 1967 and has statutory force (see *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143). Accordingly, it is my view that the respondent is not estopped from applying to set aside the counterclaim.

In the light of what I have said thus far, it is unnecessary for me to consider whether allowing the counterclaim to stand will prejudice the case for the respondent. Suffice it for me to say that the finding by the learned magistrate on this aspect is groundless.

In the upshot I dismissed the appeal with costs.

Appeal dismissed.

Reported by Kanesh Sundrum